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Al-Faiha for Engineering Products v Ranhill Bhd

B HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCC-33–10 OF 2018
DARRYL GOON JC
31 JANUARY 2019

C *Civil Procedure — Pleadings — Statement of defence — Statement of agreed facts — Whether parties bound by its pleadings — Whether defendant's evidence pleaded in defence*

D *Contract — Oral agreement — Existence of oral agreement — Whether there existed an oral agreement*

This was an appeal against the decision of the sessions court in dismissing the appellant's action against the respondent. The appellant was a Jordanian company and the respondent was a local company. The appellant had obtained a judgment against Amona Ranhill Consortium Sdn Bhd ('Amona') in the Kuala Lumpur Sessions Court for certain goods sold and delivered. During the trial, a total of two witnesses were called to testify. Amona was a subsidiary of the respondent and based on this judgment, the appellant issued a s 218 notice under the Companies Act 1965 as a prelude to the winding up petition. Consequent upon that, there was a meeting held sometime in mid-2015 ('mid-2015 meeting') which was attended by Kandalaft being the appellant's representative, Hishammuddin being Amona's representative and Nadzrim being the respondent's representative. During this meeting, it was alleged that Nadzim, on behalf of the respondent, had entered into an oral agreement with Kandalaft that if the appellant were to withhold the winding up proceedings against Amona, the respondent would make instalment payments towards settling the judgment debt against Amona. The respondent contended that they merely agreed to assist Amona by making payments to the appellant as a gesture of goodwill. The parties had agreed in the statement of agreed facts that there was a meeting in the middle of 2015. Following the mid-2015 meeting, nine installment payments were made by the respondent to the appellant, however the respondent maintained that these were no more than payments made out of 'goodwill' and what the respondent meant as good will was to look after the good name of the respondent's shareholders because the appellant was harassing the shareholders of the respondent.

E F G H I

Held, allowing the appeal with costs of RM30,000 here and below:

(1) The learned sessions court judge did not take into account the fact that by its defence, the respondent had admitted that the mid-2015 meeting had taken place, that Nadzrim was the respondent's representative, and that PW1 was never challenged in cross-examination as to the existence of the oral agreement. The learned sessions court judge also did not take into account that DW1 could not offer any evidence in rebuttal in relation to the existence of the oral agreement as he was not present at the meeting when the oral agreement was concluded (see para 16).

(2) DW1's evidence that Nadzrim was not an employee of the defendant and that there was no resolution or direction by the board of the defendant to enter into any agreement with the plaintiff were not pleaded in the defence. The defence pleaded was that there was no oral agreement as alleged, rather than Nadzrim having entered into an oral agreement on behalf of the defendant without authority to do so. It is trite that parties are bound by their pleadings and the facts that they had agreed through their counsel (see paras 17 & 19).

(3) The courts in an appellate role are generally slow to interfere with a trial judge's finding of facts. However, there are clear exceptions and well-established circumstances when they are obliged to do so. This case fell within the exception rather than the general rule. Based on the pleaded defence, the agreed facts, the failure to challenge the testimony of PW1 on the oral agreement he testified to and there being on evidence led to the contrary of PW1's testimony as to the existence of the oral agreement, the court found that the learned sessions court judge had fallen into error in dismissing the appellant's action (see paras 21 & 23).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap kepitisan mahkamah sesyen dalam mengenepikan tindakan perayu terhadap responden. Perayu merupakan satu syarikat Jordan dan responden merupakan satu syarikat tempatan. Perayu telah mendapatkan satu perintah terhadap Amona Ranhill Consortium Sdn Bhd ('Amona') di Mahkamah Sesyen Kuala Lumpur berkenaan dengan barang yang dijual dan diserahkan. Sewaktu perbicaraan, sejumlah dua saksi telah dipanggil untuk memberi keterangan. Amona merupakan anak syarikat responden dan berdasarkan penghakiman tersebut, perayu mengeluarkan satu notis s 218 di bawah Akta Syarikat 1965 sebagai satu permulaan kepada petisyen penggulungan. Lanjutan itu, satu mesyuarat telah diadakan dalam pertengahan tahun 2015 ('mesyuarat pertengahan 2015') yang dihadiri oleh Kandalaft selaku wakil perayu, Hishamuddin selaku wakil Amona, dan Nadzrim selaku wakil responden. Sewaktu mesyuarat ini, dikatakan bahawa Nadzim, bagi pihak responden, telah memasuki satu perjanjian lisan dengan Kandalaft, yang mana sekiranya perayu tidak meneruskan dengan prosiding penggulungan terhadap Amona, responden akan membuat bayaran ansuran untuk menyelesaikan hutang penghakiman terhadap Amona. Responden

menegaskan bahawa, responden hanya bersetuju untuk membantu Amona dengan membuat bayaran kepada perayu sebagai isyarat muhibah. Pihak-pihak bersetuju dalam penyataan fakta yang dipersetujui bahawa wujud satu mesyuarat di pertengahan tahun 2015. Lanjutan mesyuarat pertengahan tahun 2015 tersebut, sembilan bayaran ansuran telah dibuat oleh responden kepada perayu, walau bagaimanapun responden menegaskan bahawa ini merupakan bayaran yang dilakukan atas sebab muhibah dan apa yang responden maksudkan sebagai muhibah adalah untuk menjaga nama baik pemegang saham responden kerana perayu mengganggu pemegang saham responden.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM30,000 di sini dan di bawah:

(1) Hakim mahkamah sesyen terpelajar tidak mengambil kira fakta yang melalui pembelaannya, responden telah mengakui bahawa mesyuarat pertengahan tahun 2015 berlaku, bahawa Nadzrim merupakan wakil responden, dan bahawa PW1 tidak pernah dicabar sewaktu pemeriksaan balas mengenai kewujudan perjanjian lisan tersebut. Hakim mahkamah sesyen yang terpelajar juga tidak mengambil kira bahawa SD1 tidak dapat menawarkan apa-apa keterangan berkaitan dengan kewujudan perjanjian lisan memandangkan dia tidak hadir di mesyuarat tersebut apabila perjanjian lisan tersebut diselesaikan (lihat perenggan 16).

(2) Keterangan DW1 bahawa Nadzrim bukan seorang pekerja defendan dan bahawa tiada ketetapan atau arahan oleh lembaga defendan untuk memasuki apa-apa perjanjian dengan plaintif tidak di plid dalam pembelaan. Pembelaan memplidkan bahawa tiada perjanjian sepertima dinyatakan, dan bukannya Nadzrim yang memasuki perjanjian lisan bagi pihak defendan tanpa kuasa untuk berbuat sedemikian. Adalah mantap bahawa pihak-pihak terikat dengan pliding dan fakta yang telah dipersetujui melalui peguam mereka (lihat perenggan 17 & 19).

(3) Mahkamah dalam peranan rayuan secara amnya, perlahan untuk campur tangan dengan dapatan fakta hakim bicara. Namun, wujud pengecualian jelas dan keadaan-keadaan mantap yang memaksa mahkamah untuk berbuat sedemikian. Kes ini tergolong dalam keadaan berkecuali tersebut dan bukannya prinsip am. Berdasarkan pembelaan yang diplid, fakta yang dipersetujui, kegagalan untuk mencabar keterangan PW1 mengenai kewujudan perjanjian lisan, mahkamah mendapati bahawa hakim mahkamah sesyen terpelajar terkhilaf dalam mengenepikan tindakan perayu (lihat perenggan 21 & 23).]

Notes

For cases on existence of oral agreement, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6665–6672.

For cases on statement of defence, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 7732–7736.

Cases referred to

Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals [2003] 1 MLJ 567; [2003] 1 CLJ 585, CA (refd)
Browne v Dunn (1893) 6 R 67, HL (refd)
CME Group Bhd v Bellajade Sdn Bhd and another appeal [2019] 1 MLJ 141; [2018] 10 CLJ 147, FC (refd)
Montgomery v Lanarkshire Health Board (General Medical Council intervening) [2015] 2 All ER 1031, SC (refd)
Ng Siew Lan v John Lee Tsun Vui & Anor [2017] 2 MLJ 167; [2017] 2 CLJ 245, FC (refd)

Legislation referred to

Companies Act 1965 s 218

Anantha Krishnan (Jeevan Kaur with him) (Nathan) for the plaintiff
Fazli bin Che Saab (Noor Amran & Co) for the respondent.

Darryl Goon JC:

[1] This was an appeal against the decision of the sessions court handed down on the 18 September 2018, dismissing the appellant's action against the respondent. Thus, the appellant was the plaintiff and the respondent was the defendant before the sessions court. For ease of reference, the parties shall be referred to in their respective capacities in the sessions court.

BACKGROUND FACTS

[2] The plaintiff was a Jordanian company and the defendant, a local public company. The plaintiff obtained a judgment against a company by the name of Amona Ranhill Consortium Sdn Bhd ('Amona') in the Kuala Lumpur Sessions Court on the 19 January 2015 for certain goods sold and delivered.

[3] Amona was a subsidiary of the defendant. Based upon this judgment, the plaintiff issued what was then known as a s 218 notice under the previous Companies Act 1965, as a prelude to the filing of a winding up petition.

[4] Consequent upon that, there was a meeting held in Kuala Lumpur sometime in mid-2015 ('mid-2015 meeting') among one Kandalaft, the plaintiff's representative, one Hishamuddin, Amona's representative and one Nadzrim who, in the statement of claim was alleged to be a representative of the defendant. There is some confusion as to how Kandalaft is spelt. Before the

A sessions court the name was spelt with a Q, however, thereafter the name appears to be spelt with a K. For the avoidance of any confusion the name will be spelt with a K referring to PW1 in the sessions court.

B **[5]** It was alleged that at this meeting, Nadzrim, on behalf of the defendant, entered into an oral agreement with Kandalaft that if the plaintiff were to withhold winding up proceedings against Amona, the defendant would make instalment payments towards settling the judgment debt against Amona.

C **[6]** The agreement was alleged to be an oral agreement and thus there was no direct documentary evidence of its existence. The plaintiff's case was therefore premised entirely on the oral evidence of its witness and such circumstantial evidence as may exist.

D **[7]** It is significant that in its defence, the defendant admitted that the said meeting did take place and it was with representatives of the defendant. However, the defendant contended that the defendant merely agreed to assist Amona by making payments to the plaintiff, as a gesture of 'goodwill'. This was pleaded in para 5 of the defendant's defence.

E **[8]** For the purposes of the trial, there was also a set of agreed facts and in it, the defendant had agreed, in para 5 thereof, that in the middle of 2015 the plaintiff met with the defendant's representatives in Kuala Lumpur:

F Agreed facts

PENYATAAN FAKTA-FAKTA YANG DIPERSETUJUI

1. Defendan adalah sebuah syarikat yang diperbadankan di Malaysia dan mempunyai alamat berdaftar di Level 15, Wisma Perkeso, No. 155, Jalan Tun Razak, 50400 Kuala Lumpur.

G

2. Pada atau sekitar 2014, Plaintif telah memulakan suatu tindakan guaman di dalam Mahkamah Sesyen Kuala Lumpur Guaman Sivil No. B52C-27-09/2014 terhadap sebuah syarikat bernama Amona Ranhill Consortium Sdn. Bhd.

H

3. Plaintif telah pada 19.1.2015, memperolehi Penghakiman terhadap Amona Ranhill Consortium Sdn. Bhd. tersebut, untuk sejumlah US$130,208.50 setakat 12.9.2014 berserta faedah pada kadar 4% setahun ke atas US$114,271.00 dari September 2014 sehingga penyelesaian penuh, fee guaman sebanyak US$27,129.59 dan kos sebanyak RM1,000.00.

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4. Defendan, pada semua masa yang matan, adalah pemegang saham majoriti di dalam Amona Ranhill Consortium Sdn. Bhd. tersebut.

5. Pada atau sekitar pertengahan tahun 2015, wakil Plaintif telah bertemu dengan wakil-wakil Defendan di Kuala Lumpur.

6. Defendan telah membuat bayaran sebanyak USD50,000.00 kepada Plaintif setakat 28.8.2016.

Bertarikh pada 26 Jun 2018.

THE EVIDENCE

[9] At the trial of the action, only two witnesses testified, one for each party. Kandalaft testified as PW1 and one Izani bin Ibrahim, a director of the defendant, testified on behalf of the defendant as DW1. Neither Hishamuddin nor Nadzrim were called to testify. It was not suggested that at the time of the trial, Hishamuddin could not be located or was no longer with the defendant.

[10] PW1 testified as to the oral agreement and how, during the mid-2015 meeting in Kuala Lumpur, Nadzrim had pulled him aside, to say that if the plaintiff withheld winding up proceedings against Amona, the defendant would make monthly instalment payments of USD5,000 towards discharging Amona's judgment debt. Although it was submitted by learned counsel for the defendant that under cross-examination PW1 admitted that he never met Nadzrim, in my view, PW1's testimony was taken out of context. From the notes of evidence, it was clear that based on the questions that were posed, PW1 meant he had not met Nadzrim before ie prior to the mid-2015 meeting.

[11] Following the min-2015 meeting, nine instalment payments were made by the defendant. This was pleaded in the statement of claim and this allegation was admitted in the defendant's defence in para 7, although the defendant maintained that these were no more than payments made out of 'goodwill'. As to what that meant, in para 21 of its defence, the defendant pleaded that the payment was as 'goodwill' to look after the good name of the defendant's shareholders because the plaintiff had been harassing the shareholders of the defendant.

[12] At the trial, PW1's testimony of the existence of the oral agreement was never actually challenged by learned counsel for the defendant in cross-examination. What was put to PW1 was that Nadzrim was not an employee of the defendant. PW1 was also asked if Nadzrim had informed PW1 that he, Nadzrim, was authorised to make deals on behalf of the defendant, to which PW1 said 'no'. It was, however, never pleaded in the defence that Nadzrim had no authority to bind the defendant. The defence was essentially that there was no agreement and it was admitted that Nadzrim was a representative of the defendant.

[13] In addition to PW1's oral testimony on the alleged oral agreement, which was not challenged, were emails exchanged between PW1 and Hishamuddin, Nadzrim and several others. The fact that there was an

agreement to make payments was clear from these emails. The question was whether there was the oral agreement as alleged. In this regard there was an email dated 11 May 2017 from PW1 to Hishamuddin setting out the oral agreement that the defendant would pay the plaintiff, if the plaintiff withheld petitioning to wind up Amona. No rebuttal to this assertion was sent in reply.

[14] Hishamuddin, who when he dealt with PW1 was a director of Amona, had by this time ie on 11 May 2017, been made a director of the defendant. He was appointed director of the defendant on 9 March 2017. In his reply to PW1's email, Hishamuddin explained the difficulties in meeting the payments but never denied that there was the oral agreement as alleged in this action and which was set out in PW1's email of 11 May 2017.

[15] DW1, on the other hand, had no knowledge about the oral agreement. He was not present at the mid-2015 meeting and there was no suggestion by the defendant that he was. DW1 therefore could offer no evidence as to whether an oral agreement was arrived at between PW1 and Nadzrim at the mid-2015 meeting. In addition, DW1's testimony appeared to be that the payments by defendant to the plaintiff were advances to Amona. This seemed somewhat at odds with the pleaded defence that the payments made by the defendant to the plaintiff were as a gesture of 'goodwill' to stop the plaintiff from harassing the defendant's shareholders. It could be that what he meant was that the payment to the plaintiff on behalf of Amona was treated between the defendant and Amona as loans or advances by the defendant to Amona. What the arrangement might have been between the defendant and Amona was of course of no consequence to the plaintiff in respect of its pleaded case.

[16] The learned sessions court judge did not, in her grounds of judgment, take into account the fact that by its defence, the defendant had admitted that the meeting in mid-2015 took place, that Nadzrim was the defendant's representative and that PW1 was never challenged in cross-examination as to the existence of the oral agreement. The learned SCJ also did not take into account that DW1 could not offer any evidence in rebuttal to the existence or otherwise of the oral agreement because he was not present at the meeting when the oral agreement was concluded.

[17] Ultimately what was left for the defendant was DW1's evidence that Nadzrim was not an employee of the defendant and that there was no resolution or direction by the board of the defendant to enter into any agreement with the plaintiff. However, these too, were not pleaded in the defence. The defence pleaded was that there was no oral agreement as alleged, rather than Nadzrim having entered into an oral agreement on behalf of the defendant without authority to do so.

[18] DW1 had been with the defendant for some 16 years. When cross-examined, he claimed he did not know Nadzrim but know of him. DW1 said he had met Nadzrim at meetings but did not know which of the many companies of the defendant he was from. Yet, in the defence and agreed facts, Nadzrim was admitted to be a representative of the defendant.

[19] It is trite that parties are bound by their pleadings and the facts that they had agreed to through their counsel. As stated in the recent decision of the Federal Court in *CME Group Bhd v Bellajade Sdn Bhd and another appeal* [2019] 1 MLJ 141; [2018] 10 CLJ 147 by Zulkifli Ahmad Makinudin PCA in the decision for the majority:

> [33] With respect, *I am of the view the Court of Appeal ought not have substituted finding of facts that were neither pleaded nor put to the first defendant's witnesses during cross-examination. Parties are bound by their pleadings and unpleaded issues cannot be argued and decided upon. It is an established principle of law that an appellate court will only intervene if the decision of the lower court is 'plainly wrong'* (see the case of *GanYook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309). In the present case, it is my considered view that the Court of Appeal failed in exercising its powers of appellate intervention in reversing the findings of the learned JC. In the circumstances of this case, the plaintiff had not proved its case on the balance of probabilities against the defendants. (Emphasis added.)

[20] As regards the need to challenge the testimony of a witness and the need to put the defendant's case to the witness, this is a well settled principle of law that stems from the decision in *Browne v Dunn* (1893) 6 R 67 (HL). This principle has been accepted by our courts. In the recent decision of the Federal Court in *Ng Siew Lan v John Lee Tsun Vui & Anor* [2017] 2 MLJ 167 at pp 177–178; [2017] 2 CLJ 245 at pp 258–259, Abdul Rahman Sebli JCA delivering the decision of the Federal Court stated:

> [23] The plaintiff's testimony was that it was the first defendant who prepared and asked her to sign this letter of disclaimer. *There was no challenge to this part of her evidence in cross-examination. It was never specifically put to her that the letter was not prepared by the first defendant. It must follow that the testimony given could not be disputed at all.*
>
> [24] Yet the first defendant in his evidence gave a completely different version. He alleged that it was the plaintiff herself who prepared the letter of disclaimer. This is what he said in para 34 of his witness statement:
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> > 34. Refer to Bundle 2 at p 21. What is this document?
> >
> > – This is a document prepared by the plaintiff and signed by the plaintiff and the 3rd Defendant on the 14.10.2003 that the plaintiff and the 3rd Defendant have made arrangement by themselves and thereby discharged the 2nd Defendant from all liabilities or responsibilities under the Sale and Purchase Agreement.
>
> [25] *The effect of failure to challenge the plaintiff's evidence on this point is to render the first defendant's version wholly untenable. This is settled law and the following*

pronouncement by Lord Halsbury in the House of Lords case of Browne v Dunn (1893) 6 R 67 *is relevant*:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[26] The same point was lucidly explained by Mukharji J *in AEG Carapiet v AY Derderia* AIR 1961 Cal 359 in the following terms:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. *It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice.* It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated. (Emphasis added.)

[21] It is also pertinent to state that courts in an appellate role are generally slow to interfere with a trial judge's finding of facts. However, there are clear exceptions and well-established circumstances when they are obliged to do so. In this regard the decision of the Court of Appeal in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567; [2003] 1 CLJ 585 and the statement of the applicable law by Gopal Sri Ram JCA (as His Lordship then was) merits reproduction:

> So, it may be seen that as a general rule appellate interference is only in rare cases. Whether a particular case is a 'rare case' depends on its nature. *And we would emphasise that the categories of cases in which appellate interference is warranted is not closed though there already exists a list of established categories in which appellate interference may be warranted.* It is unnecessary for us to go through all of them here. We need only make reference to three authorities on the point. The first is *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 where this court said:
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> > It is trite law that this court will not readily interfere with the findings of fact

arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a *duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion*.

The second is *Boonsom Boonyanit v Adorna Properties Sdn Bhd* [1997] 2 MLJ 62; [1997] 3 CLJ 17:

It is trite that, apart from applying the standard of proof required by law, a trier of fact, in order to arrive at a decision according to law, must judicially appreciate the evidence led before him upon the issue called for resolution. *A decision arrived in the absence of a judicial appreciation of evidence is liable to appellate correction. Judicial appreciation is concerned with the process of evaluating the evidence for the purpose of discovering where the truth lies in a particular case. It includes, but is not limited to, identifying the nature and quality of the evidence*, assigning such weight to it as the trier of fact deems appropriate, testing the credibility of oral evidence against contemporaneous documents as well as the probabilities of the case and assessing the demeanour of witnesses.

The third is *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430, where Lord Pearce in his dissenting speech said:

The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree. (Emphasis added.)

[22] Equally, in *Montgomery v Lanarkshire Health Board (General Medical Council intervening)* [2015] 2 All ER 1031 at p 1055, Lord Kerr and Lord Reed in their joint judgment of the UK Supreme Court stated as follows:

[97] This court has reiterated in a number of recent cases, including *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, that appellate courts should exercise restraint in reversing findings of fact made at first instance. As was said in Henderson's case at para [67]:

in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, *an appellate court will interfere with the findings of fact made by a trial judge only if it*

is satisfied that his decision cannot reasonably be explained or justified. (Emphasis added.)

[23] I find that this case falls within the exception rather than the general rule. Based on the pleaded defence, the agreed facts, the failure to challenge the testimony of PW1 on the oral agreement he testified to and there being no evidence led to the contrary of PW1's testimony as to the existence of the oral agreement I find, with respect, that the learned SCJ had fallen into error in dismissing the plaintiff's action. Dismissing the plaintiff's action in light of the factors and circumstances alluded to above was, with respect, plainly wrong and cannot be reasonably justifiable.

CONCLUSION

[24] For the reasons given above, the appeal was allowed with costs. Having heard submissions by counsel, costs of RM30,000 here and below was awarded to the plaintiff appellant.

Appeal allowed with costs of RM30,000 here and below.

Reported by Izzat Fauzan